82-2141

No.

IN THE
Supreme Court of the United States
October Term, 1982

RITA CHEREN,

Petitioner,

v.

BECHTEL INCORPORATED and BECHTEL INTERNATIONAL CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT, SUPREME COURT OF THE STATE OF NEW YORK

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QUESTIONS PRESENTED

I Does a female Jewish employee with an exemplary employment record have a right to proceed in an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. even though she commenced her action four years after the date of discharge (but within one year of the consent decree described in subparagraph (a) of this question) if: (a) she was under a good faith impression she was part of a class action pending in San Francisco from where she received her payroll checks and, (b) her termination appears to be part of an organized anti-Jewish boycott dictated by foreign powers (familiarly known as the "Arab Boycott") with whom the employer seeks to do business?

II Does a forty year old employee with an exemplary employment record have a right to proceed in an action under the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. even though she commenced her action four years after the date of discharge (but within one year of the consent decree described below) if she was under a good faith impression she was part of a class action pending in San Francisco from where she received her payroll checks?

PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

1. RITA CHEREN
2. BECHTEL INCORPORATED
3. BECHTEL INTERNATIONAL CORPORATION
4. BECHTEL CORPORATION, BECHTEL POWER CORPORATION, AMERICAN BECHTEL, INC., BECHTEL ASSOCIATES PROFESSIONAL CORPORATION, BECHTEL ENERGY CORPORATION a/k/a BECHTEL GROUP OF CORPORATIONS*

*The parties listed in "4" above were named parties in the New York State action but never appeared in the action and took no part in the proceedings. The parties listed in "2", "3", and "4" above are all affiliated with each other and are all the parent companies, subsidiaries, and affiliates of each other.

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TABLE OF AUTHORITIES

In The

SUPREME COURT OF THE UNITED STATES

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OPINIONS BELOW

The order of the New York State Court of Appeals denying leave to appeal has not yet been reported.

The order of the Appellate Division, First Department, of the Supreme Court of the State of New York denying leave to appeal to the New York State Court of Appeals has not yet been reported.

The order of the Appellate Division, First Department, of the Supreme Court of the State of New York which affirmed the judgment of the Supreme Court of the State of New York, County of New York, is reported at __App. Div. __, 455 N.Y.S.2d 1015 (1st Dep't 1982).

The judgment, order, and decision of the Supreme Court of the State of New York, County of New York, have not been reported.

All of the above are included in the Appendix.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257. The order of the Appellate Division, First Department, of the Supreme Court of the State of New York was entered on November 9, 1982. A timely motion for leave to appeal to the Court of Appeals of the State of New York was denied on March 31, 1983, and this petition for certiorari was filed within 90 days of that date. American Railway Express Co. v. Levee, 263 U.S. 19.

STATEMENT OF THE CASE

Petitioner was employed as a senior secretary at the defendants' (hereinafter, "Bechtel") New York City office from August 1, 1969 through July 16, 1976, when she was disharged at the age of 40. She was one of the few women and one of the few Jews employed at Bechtel. Petitioner was very highly regarded at Bechtel and functioned on a middle managerial level outside the scope of her actual job classification. She sought promotions and rewards commensurate with her managerial responsibilities and demonstrated abilities, but was never promoted to a change in grade and title in all her seven years of employment.

During petitioner's tenure, at the behest of its many middle eastern clients, Bechtel complied with and acted in furtherance of the "Arab Boycott" against

Israel and Jews in business and employment relations. Petitioner brought Bechtel's Arab Boycott policies and activities to the attention of others both within and outside the company. In the summer of 1976, Bechtel suddenly dismantled its New York Office, after doing business there for 30 years, and transferred its New York operations to other areas of the country where there are fewer Jews in business and in the work force. It did not offer petitioner a transfer or assist her to find other employment. Subsequent t her discharge at age 40, without ever having been promoted in grade and title, petitioner has been unable to find employment at a level of responsibility, salary or benefits commensurate with her abilities.

Petitioner did not initiate any legal action against Bechtel because

she believed she was a member of the plaintiff class in two federal class action lawsuits brought against Bechtel by its women employees in the Northern District of California. Petitioner was on the payroll of Bechtel's home office in San Francisco. Bechtel's New York City office, where petitioner was employed, was but an extension of the San Francisco home office. The home office directed the work of Bechtel's New York employees. The company's organizational chart did not even show the New York City office as a separate entity. Because of her reliance on the California litigation, petitioner saw no need to pursue her claims against Bechtel separately.

Not until after the California actions were consolidated and settled by a consent decree in August, 1979 did petitioner learn that the plaintiff class

in the California litigation was limited to those women employees who were physically employed in Bechtel's San Francisco home office or elsewhere in the Northern District of California. Petitioner commenced this action in August, 1980, within one year of the consent decree in the California suit which was signed on August 15, 1979.

Petitioner commenced this litigation in August, 1980, charging Bechtel with discriminating against petitioner in her employment on the basis of age, sex and national origin, with wrongfully discharging petitioner after she exposed Bechtel's participation in the Arab Boycott, and with breaching an implied contract of employment with petitioner. Only two of the corporate defendants in the action, Bechtel Incorporated and Bechtel International Corporation, appeared in

the action. Neither Bechtel Corporation nor any of the other Bechtel entities appeared.

On February 13, 1981 Bechtel moved to dismiss petitioner's complaint in the Supreme Court of the State of New York, County of New York. That court granted Bechtel's motion, ruling inter alia, that petitioner's claims are time-barred to the extent that they are grounded in discrimination based on age, sex or national origin, and that petitioner failed to state a cause of action for abusive discharge in that such a cause of action is not recognized in New York.

The Appellate Division, First Department of the Supreme Court of the State of New York affirmed the judgment of the court below based on the lower court's decision. The New York State Court of Appeals denied a motion for leave to appeal.

The federal questions sought to be reviewed were raised at all stages in the New York State courts.

REASONS FOR GRANTING THE WRIT

1. The decisions by the New York State Courts are in conflict with this Court's decision in Crown, Cork & Seal Company, Inc. v. Parker and American Pipe and Construction Co. v. Utah.

This Court recently held that the statute of limitations under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., is tolled for persons who would have been members of a class for which certification was denied, during the pendency of the action. Crown, Cork & Seal Company, Inc. v. Parker, 51 U.S.L.W. 4746, (June 13, 1983) (Docket No. 82-118). The decision in Crown, Cork & Seal relied on an earlier decision of this Court, American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974), which held that the filing of a class action under the federal anti-trust statutes tolled the statute of limitations for potential class members.

In those cases, this Court found that the purposes of the class action procedure under Rule 23 of the F.R.C.P. (promotion of efficiency and economy of litigation) would be frustrated unless the commencement of the class action suspended the applicable statute of limitations for the asserted members of the class.

In the instant case, petitioner had a good faith, reasonable belief that she was a member of a class in two seperate actions against defendants for sex discrimination. Martinez v. Bechtel Corporation, Docket No. C-72-1513 SW (N.D. Cal. 1979) and Benbrook v. Bechtel Corporation, Docket No. C-74-2402 SW (N.D. Cal. 1979). Those actions involved female employees of the San Francisco Bechtel office. Petitioner had been on the payroll of the San Francisco office. In addition, the New York office

in which petitioner worked was considered by Bechtel to be an extension of the San Francisco office. Thus, petitioner reasonably believed that she was an employee of the San Francisco office and as such a member of the classes in the Martinez and Benbrook actions. It was only after August 15, 1979, when a consent decree was signed settling those actions, that petitioner learned she was not included within the terms of the consent decree. Petitioner initiated her action in August 1980, within the statute of limitations of Title VII.

Therefore, the New York Counts erred in dismissing petitioners claim as time-barred.

2. **The decisions of the New York State Courts are in conflict with decisions of the United States Circuit Courts of Appeals.**

The United States Circuit Courts of Appeals which have ruled on the issue of whether the statute of limitations under 42 U.S.C. § 2000e-5 can be tolled for equitable reasons have decided in the affirmative. Leake v. University of Cincinnati, 605 F.2d 255 (6th Cir. 1979) (time limits tolled during pending of private, voluntary negotiations); Hart v. J. T. Baker Chemical Co., 598 F.2d 829 (3rd Cir. 1979); Bethel v. Jefferson, 589 F. 2d 631 (DC Cir. 1978) (time limits tolled because of confusing procedural requirements); McDonald v. United Air Lines, Inc., 587 F.2d 357 (7th Cir. 1978), cert. denied, 442 U.S. 934 (1979), rehearing denied, 444 U.S. 890 (1979); Page v. U.S. Industries, Inc., 556 F.2d 346 (5th Cir. 1977), cert.

denied, 434 U.S. 1045 (1978); Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924 (5th Cir. 1975). Contrary to these decisions the New York State courts have refused in the instant case to apply equitable principles to toll the statute of limitations.

Similarly, petitioner's claims under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq., are subject to tolling of the statute of limitations period for equitable reasons. The courts have uniformly held that the statute of limitations provision under the ADEA is not a jurisdictional prerequisite to maintaining an action and may be extended as equity requires. Dartt v. Shell Oil Co., 539 F.2d 1256 (10th Cir. 1976), aff'd per curiam by an equally divided court, 434 U.S. 99 (1977), rehearing denied, 434 U.S. 1042 (1978).

The legislative history of the 1978

amendments to the ADEA shows that Congress explicitly ratified this interpretation of the ADEA. The Conference Report states that the conferees

> agree that the 'charge' requirement is not a jurisdictional prerequisite to maintaining an action under the ADEA and that therefore equitable modification for failing to file within the time period will be available to plaintiffs under this Act.

H.R. Conf. Rep. No. 95-950, 95th Cong., 2nd Sess. 12 (1978).

In addition, the ADEA itself was amended to provide for a tolling period during the pendency of conciliation efforts. 29 U.S.C. § 626(e).

Where a lone employee with meager resources seeks redress from a boycott organized by approximately twenty sovereign powers, backed by the unprecedented wealth of petroleum, who seek to dictate to United States corporations which Amer-

icans should be employed based on religious, national origin and sex considerations the courts should exercise the greatest indulgence to assure the employee her day in court. This is especially so where the employee presents bona fide reasons for assuming that her rights would be protected and she would have her day in court in other then pending proceedings. The relegation of an employee to the EEOC or a like commission which may be subjected to attempted executive branch overreaching and preventing redress before a neutral magistrate and fact finder should not be lightly inferred. Furthermore, when it is alleged that the defendants' actions led in part to the employee's misunderstanding of the significance of the then pending actions, by virtue of having the employee on its home office (San Francisco, where

the actions were pending) payroll and treating the New York City office as an extension of the San Francisco office and not as a separate entity, the reasons are even more compelling to permit redress of the employee's grievances before a neutral magistrate.

CONCLUSION

For the foregoing reasons a writ of certiorari should issue to review the judgment of the Appellate Division, First Department, Supreme Court of the State of New York.

Respectfully submitted,

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(212) 832-3543

Counsel for Petitioner

June 27, 1983

APPENDIX

APPENDIX A—ORDER OF THE NEW YORK STATE COURT OF APPEALS DENYING LEAVE TO APPEAL

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the thirty-first day of March A.D. 1983

Present, HON. LAWRENCE H. COOKE, *Chief Judge, presiding.*

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1 Mo. No. 273
Rita Cheren,

Appellant,

vs.

Bechtel Corporation, et al.,

Defendants,

and Bechtel Incorporated & ano.,

Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, hat the said motion be and the

same hereby is denied with twenty dollars costs and necessary reproduction disbursements.

s/ Joseph W. Bellacosa

Joseph W. Bellacosa

Clerk of the Court

APPENDIX B—ORDER OF THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK DENYING LEAVE TO APPEAL TO COURT OF APPEALS

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on January 25, 1983.

Present—Hon. Francis T. Murphy, Jr., Presiding Justice
Theodore R. Kupferman,
Leonard H. Sandler,
E. Leo Milonas, Justices.

Rita Cheren,

Plaintiff-Appellant,

-against-

Bechtel Corporation, Bechtel Power Corporation, American Bechtel, Inc., Bechtel Associates Professional Corporation, Bechtel Energy Corporation a/k/a Bechtel Group of Corporations,

Defendants,

-and-

Bechtel Incorporated and Bechtel International Corporation,

Defendants-Respondents.

The above-named plaintiff-appellant having moved for leave to appeal to the Court of Appeals

from the order of this Court entered on November 9, 1982,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the papers filed in support of said motion, and the papers filed in opposition or in relation thereto; and due deliberation having been had thereon,

It is ordered that said motion be and the same hereby is denied with $20 costs.

ENTER:

s/ Francis X. Xfacha

Deputy Clerk.

APPENDIX C—ORDER OF THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK AFFIRMING JUDGMENT AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on November 9, 1982

Present—
Hon. Francis T. Murphy, Jr., Presiding Justice
Theodore R. Kupferman
Leonard H. Sandler
Arthur Markewich
E. Leo Milonas, Justices.

RITA CHEREN,

Plaintiff-Appellant,

-against-

BECHTEL CORPORATION, BECHTEL POWER CORPORATION, AMERICAN BECHTEL, INC., BECHTEL ASSOCIATES PROFESSIONAL CORPORATION, BECHTEL ENERGY CORPORATION a/k/a BECHTEL GROUP OF CORPORATIONS,

Defendants,

-and-

BECHTEL INCORPORATED and BECHTEL INTERNATIONAL CORPORATION,

Defendants-Respondents.

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Appeals having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Greenfield, J.), entered on July 6, 1981, which granted defendants-respondents' motion to dismiss the complaint as to them, and from the judgment of said court, entered thereon on July 16, 1981,

And said appeals having been argued by Gary Sinawski of counsel for appellant, and by Dennis Orr of counsel for respondents; and due deliberation having been had thereon,

It is unanimously ordered that the judgment so appealed from be and the same hereby is affirmed for the reasons stated by Greenfield, J., at Special Term, without costs and without disbursements. The appeal from the order is dismissed as having been subsumed in the appeal from the judgment, without costs and without disbursements.

ENTER: J. LUCCHI

Clerk.

APPENDIX D—JUDGMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK, DISMISSING COMPLAINT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

RITA CHEREN,

Plaintiff,

-against-

BECHTEL CORPORATION, BECHTEL POWER CORPORATION, BECHTEL INCORPORATED, AMERICAN BECHTEL, INC., BECHTEL ASSOCIATES PROFESSIONAL CORPORATION, BECHTEL ENERGY CORPORATION and BECHTEL INTERNATIONAL CORPORATION, a/k/a BECHTEL GROUP OF CORPORATIONS,

Defendants.

Index No. 18490/80

Upon motion by defendants Bechtel Incorporated and Bechtel International Corporation (collectively "Bechtel") for an order dismissing each cause of action in plaintiff's verified complaint, said motion having regularly come on to be heard on April 16, 1981, and due deliberation having been had thereon, and upon the order of this Court by Mr. Justice Greenfield, dated June 30, 1981 (a copy of which being attached hereto):

IT IS HEREBY ADJUDGED that each and every cause of action in plaintiff's verified complaint as against Bechtel Incorporated and Bechtel International Corporation is hereby dismissed in all respects, with costs in the amount of $85.00 in favor of defendnats Bechtel Incorporated and Bechtel International Corporation, and against Rita Cheren as taxed by the Clerk of this Court on July 15, 1981.

s/ Norman Goodman

Clerk

Filed

July 16, 1981

County Clerk's Office

New York.

APPENDIX E—ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK, DISMISSING COMPLAINT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

RITA CHEREN,

Plaintiff,

-against-

BECHTEL CORPORATION, BECHTEL POWER CORPORATION, BECHTEL INCORPORATED, AMERICAN BECHTEL, INC., BECHTEL ASSOCIATES PROFESSIONAL CORPORATION, BECHTEL ENERGY CORPORATION AND BECHTEL INTERNATIONAL CORPORATION, a/k/a BECHTEL GROUP OF CORPORATIONS,

Defendants.

Defendants Bechtel Incorporated and Bechtel International Corporation (collectively "Bechtel") having moved for an order dismissing each cause of action in plaintiff's verified complaint; the Court having read and filed the notice of motion of the defendants dated February 13, 1981, the Affidavit of Werner L. Polak, Esq., and exhibits thereto, sworn to February 13, 1981, the Affidavit of plaintiff Rita Cheren sworn to April 8, 1981 and the Affidavit of Dennis P. Orr sworn to April 15, 1981;

said motion having regularly come on to be heard on April 16, 1981; and due deliberation having been had thereon; and upon the decision of this court by Mr. Justice Greenfield, dated May 28, 1981:

NOW, on the motion of Shearman & Sterling, attorneys for Bechtel, it is

ORDERED that Bechtel's motion to dismiss all of the causes of action in plaintiff's verified complaint is granted in all respects, the complaint is dismissed and the clerk is directed to enter judgment.

ENTER

s/ EJS

J.S.C.

FILED

JUL 6-1981

CO. CLERK'S OFFICE

NEW YORK

DECISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK, DISMISSING COMPLAINT

SUPREME COURT: NEW YORK COUNTY
SPECIAL TERM: PART I

RITA CHEREN,

Plaintiff,

-against-

BECHTEL CORPORATION, BECHTEL POWER CORPORATION, BECHTEL INCORPORATED, AMERICAN BECHTEL, INC., BECHTEL ASSOCIATES PROFESSIONAL CORPORATION, BECHTEL ENERGY CORPORATION and BECHTEL INTERNATIONAL CORPORATION, a/k/a BECHTEL GROUP OF CORPORATIONS,

Defendants.

INDEX NO. 18490/80

GREENFIELD, J.:

Motion to dismiss the complaint is granted. Plaintiff allegedly was wrongfully discharged by defendant in 1976. The complaint alleges that during her employment she was denied promotions and ultimately discharged because of her sex, age, and national origin; and in breach of an implied contract of employment.

To the extent plaintiff's claims are grounded on

alleged discrimination based on age, sex or national origin, they are time-barred. Section 297(5) of the Human Rights Law requires that any such complaint must be filed within one year of the allegedly unlawful discriminatory practice. It is conceded that plaintiff was employed between 1969 and 1976 and that this action was not commenced until 1980. Plaintiff's mistaken reliance on the belief that she was somehow a plaintiff in an otherwise unrelated California class action suit is of no moment to her failure to meet the condition precedent of §297(5). Nor has plaintiff stated a cause of action for the tort of abusive discharge. Such a cause of action is not recognized in this state. (Chin v. American Telephone & Telegraph Co., 96 Misc 2d 1070 [Sup. Ct. 1978]; *affd* 70 App. Div. 2d 791 [1st Dept. 1979]; mot. for lv. to app. den., 48 NY2d 603 [1979]). The seventh cause of action, alleging plaintiff's failure to find equivalent employment also fails to state a cause of action. At most plaintiff's gratuitous allegation refers to damages sustained and nothing more.

Accordingly, the motion to dismiss is granted in all respects.

Settle order.

DATED: May 28, 1981.

s/ EJS

J.S.C.